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589310—44——1

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 960

STANDARD KNITTING MILLS, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 142–148) is reported at 141 F. (2d) 195. The findings of fact and opinion of the Board of Tax Appeals (now The Tax Court of the United States) (R. 47–76) are reported at 47 B. T. A. 295.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 8, 1944 (R. 142). The petition for a writ of certiorari was filed on May 3, 1944. The jurisdiction of this Court is in-

voked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the court below properly held that in determining the "actual extent" to which the taxpayer shifted the burden of an unpaid federal excise tax, and thereby became liable for the tax imposed by Section 501 (a) (1) of the Revenue Act of 1936, the increase in its statutory "margin" for the taxable year over its "average margin" for the base period should be apportioned between the unpaid federal excise tax and the increase in other costs during the tax period.

2. Whether the findings of the Tax Court relating to the taxpayer's business operations over a period of years warranted its conclusion that the taxpayer did not shift the burden of any part of the unpaid federal excise tax.

STATUTE INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra,* pp. 10–19.

STATEMENT

This proceeding was instituted before the Board of Tax Appeals for redetermination of a tax deficiency for the year 1935 asserted against Standard Knitting Mills, Inc., a Tennessee corporation (hereafter referred to as the taxpayer), under authority of Section 501 (a) (1) of the Revenue Act of 1936, c. 690, 49 Stat. 1648 (Ap-

pendix, *infra,* p. 10). That section imposes a tax equal to 80 per centum thereof upon the net income of every individual which arises "from the sale of articles with respect to which a Federal excise tax was imposed on such person but not paid which is attributable to shifting to others to any extent the burden of such Federal excise tax". The income subject to the tax thus imposed may not exceed the taxpayer's net income for the entire taxable year from the sale of articles with respect to which the particular federal excise tax was imposed.

The statute provides alternative methods for computing the net income from sales of articles with respect to which the unpaid excise tax was imposed (Section 501 (c), Appendix, *infra,* p. 11), and also provides alternative methods for computing the "presumed" extent to which the taxpayer derived income by shifting to others the burden of the unpaid excise tax (Section 501 (e) (1) and (2), Appendix, *infra,* pp. 12–13). The "presumed" extent to which the taxpayer derived income by shifting to others the burden of the unpaid excise tax may not exceed, however, the amount of the unpaid tax (Section 501 (e) (3), Appendix, *infra,* p. 13). After the presumed extent to which income was so derived has been computed, either the taxpayer or the Commissioner may overcome this presumption by proving the "actual extent" to which the burden of the unpaid tax was shifted (Section 501 (i), Appendix, *infra,* p. 15).

During the entire period material to this proceeding the taxpayer was engaged in the business of spinning cotton into yarn and knitting underwear and other garments. As such it was subject to the Agricultural Adjustment Act, including the provisions imposing a tax upon the first domestic processing of cotton. (R. 48–49.) The taxpayer paid the tax imposed under that Act until about April, 1935, when it obtained an injunction enjoining the Collector from collecting the tax. Thereafter it deposited in escrow the sum of $95,-896.29 for processing taxes for the months of April to August 1935 inclusive. The sum of $64,149.42 which would have been payable for the months of September to December 1935, inclusive, was not paid or placed in escrow. (R. 52.)

It is this unpaid processing tax of $160,045.71 which gives rise to the present controversy concerning the taxpayer's unjust enrichment tax liability under Section 501 (a) (1) for the year 1935. The taxpayer first filed a tentative unjust enrichment tax return, and later filed a completed return for 1935 showing an unjust enrichment tax liability of $38,538.69, which subsequently was paid with interest (R. 49). Upon audit of this return the Commissioner of Internal Revenue determined a deficiency of $21,662.01 in the taxpayer's unjust enrichment tax liability (R. 17–42). The Board of Tax Appeals redetermined a deficiency in the sum of $8,301.47 (R. 84–85). The taxpayer appealed to the Circuit Court of

Appeals for the Sixth Circuit (R. 85–87), which affirmed the Board's decision in all respects (R. 142–148).

The Commissioner's determination of the taxpayer's liability for unjust enrichment tax (R. 17–42) was made in accordance with the alternative method of computation prescribed in Section 501 (e) (2) of the 1936 Act (R. 52, 59, 70), which provides that the extent to which a taxpayer derived income by shifting to others the burden of an unpaid federal excise tax shall be determined by deducting from the aggregate selling price of all articles sold during the year with respect to which the federal excise tax was imposed the aggregate cost of such articles and reducing the result to a "margin per unit in terms of the basis on which the Federal excise tax was imposed." The excess of such margin per unit over the "average margin" (computed for the same unit) is then multiplied by the number of such units represented by the articles with respect to which the computation is being made (Section 501 (e) (2)). The statute then defines "cost", "selling price", "margin", and "average margin" as used in connection with this computation (Section 501 (f) (Appendix, *infra,* p. 13)).

In this case the taxpayer sought to rebut this presumption, as it was permitted to do under the statute, by proof of the "actual extent" to which it shifted the burden of the unpaid processing tax. Several issues were presented to the Board. The

Board made extensive and detailed findings of fact (R. 48–56), and wrote an elaborate opinion (R. 57–76) dealing with the questions involved. The Board found, *inter alia,* that the taxpayer's "average margin" per unit in the base period was $0.270777453 per pound lint cotton processed, that its "margin" per unit in the tax period was $0.325653141 per pound of lint cotton processed, and that its "margin" per unit for the tax period exceeded its "average margin" for the base period by $0.054875688 (R. 56).

This excess in "margin" for the tax period was more than the unpaid processing tax of $0.042 per pound; hence under the statute it was presumed that the burden of the full amount of unpaid processing tax had been shifted. In actual figures the Board found that the correct amount of unpaid processing tax for the period from April 1, 1935, through the close of the year was $90,868.97, but that on the basis of the statutory margin comparison it was "presumed" that the taxpayer had realized income in the sum of $118,726.13 which was attributable to shifting to others the burden of the unpaid processing tax (R. 56).

However, as part of its rebuttal proof the taxpayer proved that its expenses, other than cost of material, had increased $0.028528261 per pound during the tax period as compared with such expenses for the base period (R. 56). The unpaid processing tax and the increased expenses thus

amounted to $0.070528261 in the tax period as compared with an increase in "margin" of $0.054875688 (R. 56). Consequently, the increase in "margin" for the tax period was not sufficient to permit the taxpayer to recover all of its increase in expenses and to shift the burden of the full amount of unpaid processing tax.

The Board further found as a fact that the "increased margin in the taxable year over the base period was due, proportionately both to the processing tax of $0.042 per unit and to the increase of $0.028528261 in other cost, a total of $0.070528261 per unit" (R. 56). On the basis of this finding the Board apportioned the increase in margin between the unpaid processing tax and the increase in other costs, as provided in Section 501 (i) (1) of the Act, and concluded that the taxpayer had shifted the burden of the unpaid processing tax to the extent of $70,702.12 (R. 56). These findings and conclusions were upheld by the Circuit Court of Appeals (R. 142–148).

ARGUMENT

The taxpayer advances two contentions as grounds for granting certiorari in this case (Pet. 7–8). We submit that both are without merit.

1. The decision below is not in conflict with the holding of the Circuit Court of Appeals for the Second Circuit in *E. Regensburg & Sons* v. *Helvering,* 130 F. 2d 507, and *Helvering* v. *E. Regensburg & Sons,* 139 F. 2d 883. In its first opinion

in that case (130 F. 2d 507) the Circuit Court of Appeals indicated its approval of the principle of allocating the increase in margin proportionately between the tax and increased costs of production, as provided in the statute which was there involved. However, no question of allocation was involved at that stage of litigation. On remand, the Processing Tax Board of Review made additional findings at the direction of the appellate court, and concluded that the taxpayer had borne the burden of the full amount of processing tax paid by it. That Board made no finding, such as was made by the Board of Tax Appeals in this case, that the increase in margin was due proportionately to the imposition of the tax and to the increase in other costs during the tax period. In other respects the factual situation there was similar to the instant case. The processing tax and the increase in cost of production exceeded the increase in margin for the tax period. The principal question raised by the Commissioner on the second appeal was whether the Processing Tax Board of Review had erred in not allocating the increase in margin proportionately between processing tax and the increase in cost of production. The Circuit Court of Appeals held in effect that the Board of Review had in fact found that no part of the increase in margin was due to the shifting of the tax. 139 F. (2d) 883.

2. The court below and the Board of Tax Appeals did not err, as the taxpayer contends (Pet.

7, 8), in failing to give effect to the Board's findings as to change in character of garments, reduction in cost through savings in material, reduction in cost through development of high-speed sewing machines, and resulting increase in profits notwithstanding decreased selling prices. The opinions of both the Board and the Circuit Court of Appeals show these findings were fully justified by the evidence. And there is nothing in the record to show that these factors had any greater effect upon taxpayer's margins than that given them by the Board. In any event, questions as to the weight and significance to be given evidence in a particular case before the Tax Court do not warrant further review by this Court. Cf. *Dobson* v. *Commissioner,* 320 U. S. 489.

CONCLUSION

The decision below is correct. There is no conflict of decisions, and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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MAY 1944.